United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1739

73-8177

United States Court of Appeals

For the Second Circuit.

UNITED STATES OF AMERICA,

Appellee,

-against-

SOLOMON GLOVER,

Defendant-Appellant.

On Appeal From The United States District Court For The Southern District Of New York

Appellant's Brief

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TABLE OF CONTENTS

TABLE OF CASES

Table of Statutes and Authorities

STATEMENT OF ISSUES

Appellant contends that the indictment outstanding against him should be dismissed on grounds of former jeopardy, since jeopardy had attached in the trial Court in the Southern District of New York. Appellant contends that there was no manifest necessity to terminate the trial as to him in view of viable alternatives available even after the Court's interpretation of the rule in Bruton v. United States 392 US 123 (1968). Finally appellant contends that the Appeal is not pre-mature in view of the nature of the relief sought.

STATEMENT OF FACTS

Solomon Glover, Defendant-Appellant, herein after for purposes of clarity referred to as Appellant, was indicted on April 17, 1973. He and others were charged with violation of Title 21, Sections 812, 841 (a) (1); and 841 b (1) (A), of the United States Code; to wit: conspiracy to Distribute Possession With Intent to Distribute, Schedule 1 and Schedule 2 Narcotic Controlled substances, under indictment number 73-Cr. 327. On July 2, 1973, defendants Zanfardino, Campopiano, Lentini and two others were indicted for conspiracy to bribe Federal Officers, actually bribing Federal Officers, and Two Counts of Obstruction of Justice (under Indictment No. 73 Cr. 631).

Tuesday July 17th 1973, prior to the trial, defendants Abbamonte, Lentini, Coumontos, Odierno, and Mack pleaded guilty to various counts of the Indictment, defendants Zanfardino, Campopiano, Boria, and Glover remained to be tried.

On the fourth day of the trial, Friday, July 20, 1973, near the end of the presentation of the case against Campopiano, the Government began presentation of part of its case against Glover. Agent Harvey Tuerack, of the Drug Enforcement Agency testified as to Appellant Glover.

At the beginning of the fifth day of trial, July 23, 1973, the Court requested an application in behalf of Appellant Glover, and defense counsel declined to make an application. The Court then proposed two alternatives

to counsel for the Government, as the Court's interpretation regarding admissibility of statements of co-defendants.

Of the rule in Bruton v. United States 392 U.S. 123 (1968). The Court proposed that Government either proceed without the alleged statements against Glover, or move for a severance and mistrial as to defendant Glover. The Government chose to move for Severance and mistrial as to defendant Glover, and the motion was granted.

Appellant filed Notice of Motion to dismiss the Indictment in the Southern District of New York August 9, 1973, with a supporting Memorandum of Law. On December 14th 1973, Judge Brieant of the Southern District of New York entered a Memorandum and Order denying the defendants Motion to Dismiss. (Entered in the Law Journal December 17th 1973 under the caption United States of America v. Zanfardino et al. Defendant'-Appellant's counsel did not immediately note this entry, believing the Order would be entered under the name of Glover.

Notice of Appeal was filed for Defendant-Appellant Glover on Jan. 9th 1974 in the Court of Appeals for the Second Circuit pursuant to 28 U.S.C. 12 1291.

POINT I

RETRIAL OF DEFENDANT GLOVER WOULD VIOLATE THE LETTER AND SPIRIT OF THE PROHIBITION IN THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AGAINST DOUBLE JEOPARDY

Retrial of defendant Glover would violate the letter and spirit of the prohibition in the Constitution of the United States against double jeopardy. The Fifth Amendment provides specifically that no person "shall be subject for the same offense to be twice put in jeopardy of life or limb..." USCAConst. Amend 5. Double jeopardy, or former jeopardy as it is also called, was an issue as far back 1895 in United States v. Ball 163 U.S. 662 (1895), 16 Sct 1192, 41 L. Ed. 300. in that case, among the earliest on the issue, Justice Gray, speaking for the Court stated:

"

... the prohibition of the double jeopardy clause is not against being twice punished, but against being twice put in jeopardy....." Ball at 669. In Ball the Court found that it was lawful to retry the defendant after he had successfully set aside his conviction on appeal.

Another outstanding case on the problem of double jeopardy is Green v. United States 355 Us184 (1957). Speaking for the court, justices Black and Douglas stated:

"..... The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence is that the State, with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarassment, expense and ordeal, compelling him to live in a continuing state of anxiety and insecurity as well as enhancing the possibility that even though innocent he may be found guilty..... Green at 187-188.

The Court in United States v. Jorn 400 Us470 (1971) also considered the underlying theories of the prohibition against double jeopardy. Mr. Justice Harlan, speaking for the Court:

"... A power in Government to subject the individual to repeated prosecutions for the same offense would cut deeply into the framework of the procedural protections which the Constitution established for the conduct of the criminal trial. An society's awareness of the heavy personal strain for the individual defendant is manifested in the willingness to limit the Government to a single criminal proceeding to vindicate its very interest in enforcement of criminal laws..." Jorn at 479.

The Court found that the protection from double jeopardy obtained where the trial judge had stopped the trial and dismissed the jury in order that witnesses could consult with their attorneys and be (adequately) informed of their rights. While considering the basic theories underlying the Double Jeopardy Clause, the Court in Jorn pointed out that the defendant should not be deprived of his "substantial right to have his case tried to the first jury chosen...." Id at 454.

In Wade v. Hunter 336US684, 93 L. Ed. 974 reh. den. 69 SCt 1152. the Court also considered the issue of double jeopardy. In discussing the reasoning underlying the prohibition against double jeopardy, the Court pointed out that the defendant had..." a valued right to have the trial completed by a particular tribunal..." Wade at 689. The Court held that the exigencies of battle had dictated that the trial be terminated, and that the defendant could not in those circumstances invoke the protection of the Double Jeopardy Clause.

The theories underlying the Double Jeopardy Clause were considered also in Abbatte v. United States 359US187, 79 S. Ct. 666, 3L Ed. 2d 729(1959,

The Court said:

"... The basis of the Fifth Amendment protection against double jeopardy is that a person shall not be harassed by successive trials, that an accused shall not have to marshal the resources and energies necessary to his defense more than once for the same alleged criminal acts..."
Abbatte at 198-199

Although there was at one time some dispute among the Courts as to precisely when jeopardy was incurred by a defendant, it is no longer a serious problem in the Federal Courts. In Green, supra, the Court observed:

"....Moreover, it is not even essential that a verdict of guilt or innocence be returned for a defendant to have once been placed in jeopardy so as to bar a second trial on the same charge. This Court as well as most others has taken the position that a defendant is placed in jeopardy once he is put to trial before a jury so that if the jury is discharged without his consent he cannot be tried again. Wade, supra, Kepner v. United States 195US 100, 128. Green at 188

The Court in Jorn, supra, concluded as to the time when jeopardy attached:

"....These considerations have led this Court to conclude that a defendant is placed in jeopardy in a criminal proceeding once the defendant is put to trial before the trier of facts, whether the trier be a jury or a judge...." Id at 479.

Also in Remaley v. Swope, 100 F2d 31, C.C.A. Wash., the Court said that double jeopardy does not depend on the result of a trial but on the fact of a trial. In light of these cases, the fact that the defendant Glover was neither convicted nor acquitted is irrelevant, then, to the consideration of whether or not he can successfully invoke the Constitutional protection. The trial had begun. Transcript July 17, 1973 page 10a [See Appendix]. When the mistrial was declared as to the appellant, the jury had impaneled and sworn. Opening statements outlining the prosecution's expected case had been made to the jury, and more than one witness had been sworn and had testified. In sum, as to defendant Glover, jeopardy had attached. To place him on trial again,

would, by definition, constitute for him a double jeopardy. The Constitution is undisputedly one of the foundations of the nation. To lightly brush aside protections afforded each citizen is to endanger a foundation of the country, and to depart from uniform application of Constitutional guarantees is to undermine them.

Appellant especially wishes to call attention at this time to the attitude of the prosecution and the Court below, in that each made repeated reference to the merits of the indictment, ie the guilt or innocence of the appellant, in the Memorandum and Order December 14, 1973 [See Appendix Order p. 25] Such a reference was thinly veiled in terms of " public justice" and proper judicial administration. In fact, the guilt or innocence of the appellant is a matter which is quite apart from the issue in the instant case. The issue is whether or not the appellant must be made to stand trial twice for the same indictment, The Court in United States v. Lansdown 460 F 2d 164 (1972), emphasized this as the issue to be addressed. The Court stated:

"....First defendant's right is under the Fifth Amendment, and is separable from and collateral to the main cause of action, which is whether he is innocent or guilty of the crimes charged...." Lansdown, supra at 171

In sum, appellant contends that the indictment outstanding against him should be dismissed on grounds of former jeopardy, Jeopardy had attached in the trial Court. The Memorandum and Order Dec. 14, 1973 of Judge Bricant of the Southern District did not make a finding that jeopardy did not attach, in ruling on the Glover's Motion to Dismiss. [Appendix]

POINT 2

THE REQUISITE MANIFEST NECESSITY FOR TERMINATION OF THE TRIAL WAS ABSENT AS TO DEFENDANT GLOVER.

The requisite manifest necessity for termination of the trial was absent as to the defendant Glover. It is the contention of the defense that the Court termination of the trial was incorrect. The general rule on when a mistrial can be declared in connection with the Double Jeopardy Clause, was first set forth by Mr. Justice Story in United States v. Perez 9 Wheat (1824)

"... We think, that in all cases of this nature, the law has intested courts of justice with the authority to discharge a jury from giving any verdict whenever, in their opinion taking all circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject, and it is impossible to define all the circumstances which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances and for very plain and obvious causes..." Perez at 580.

Mr. Justice White in a dissenting opinion in Illinois v. Somerville 41 OUS458, (1973), gave his interpretation of the doctrine of "manifest necessity". He stated:

...." The Court has frequently addressed itself to the general problem of mistrials and the Double Jeopardy Clausemost recently in United States v. Jorn (supra). We have abjured mechanical per se rules and have preferred to rely on the approach first announced in United States v. Perez (supra). Under the Perez analysis a trial Court has authority to discharge a jury prior to verdict, and the Double Jeopardy Clause will not prevent retrial, only if the trail Court takes "all the circumstances into consideration" and in its "sound discretion" determines that "thereis manifest necessity for the act, or the ends of public justice would be defeated" Perez at 580 Somerville at 472

The guide of "manifest necessity" has been restated several times in Wade, supra, the Court observed:

"....At times the valued right of a defendant to have his trial completed by the particular tribunal summoned to sit in judgment on him may be subordinated to the public interest when there is an imperious necessity to do so.

Wade at 690

"Manifest necessity was also restated by Justice Story in United States v, Coolidge 25 FedCas 622: "..... The discretion to discharge the jury before it has reached a verdict is to be exercised only in very extraordinary and striking circumstances. *Coolidge at 622-623*

In light of the foregoing cases then, a trial is to be aborted only if there is "manifest necessity". There are instances in the opinion of the Supreme Court when a trial must be terminated and when the defendant cannot subsequently invoke the protection of the Double Jeopardy Clause. Among these are " inability of a jury to agree on a verdict, Perez, supra, Logan v. United States 144Us263, Dreyer v. Illinois 187US71, Keerl v. Montana 213 US 135, exigencies of a battle, Wade, supra, finding of bias of a juror during the trial, Simmons v. United States 142 US 148, Thompson v. United States, 155US271, a discivery duing the trial that the defendant had not been arraigned, Lovato v. New Mexico 242 Us 199 (1916) and a finding during the trial that the indictment was flawed, Illinois v. Somerville, supra. Certiorari has been granted many times on the issue of Double Jeopardy and mistrial. As Mr. Justice Frankfurter observed (in anopinion announced by Mr. Justice Clark) stated in Gori v. United States 367 US 364 (1961).

".....Judicial wisdom counsel against anticpating hypothetical situations in which the discretion of the trial judge may be abused and so call

for the safeguard of the Fifth Amendment-cases in which the defendant would be harassed by successive oppressive prosecutions or in which a judge exercises his authority to help the prosecution at a trial in which its case is going badly, by affording it another, more favorable opportunity to convict the accused....." Gori at 369.

As is often said " each case must turn on its facts' (quoting Downum v. United States 372 Us 734 (1963). In the instant case, the prosecution was going to introduce the extra-judicial statements allegedly made by defendant Glover when he was cooperating with the Government. The Court decided that as it interpretated the rule in Bruton v. United States 391 US123 (1968) co-defendants named Glover's alleged statement would be deprived of their 6th Amendment right to confront the witnesses against them because the extra-judicial statement would necessarily be hearsay, and no jury instruction to disregaud mention co-defendants could be adequate. It is not the contention of the defense that the court misinterpretate the Bruton rule, in deciding that defendant Glover's extra-judicial statements, mentioning co-defendants were not admissible.

It is the contention of the defense that the Court erred in weighing the alternatives available after it interpretted the Bruton rule. The defense views the following as the alternatives: a. declare none of Glover's alleged statements admissable, and declare a mistrial and severance. b. admit a redacted version of the alleged extra-judicial statements, and give the appropriate jury instructions and proceed with the trial; c. declare all of Glover's extra-judicial statements inadmissable, and proceed with the trial. The defense strongly contends that the third alternative, namely declaring

the evidence inadmissable, and proceeding with the trial is the alternative which the Court should have pursued, and that hence, there was no" manifest necessity" as to the defendant Glover. Instead, however the Court declared the statements inadmissible, and solicited applications for mistrial first from the defense, and when defense declined, solicited and obtained such application from prosecution. Mr. Justice Marshall, in his dissent in Somerville, supra highlighted just this point when he observed:

> *".... To assume that continuing the trial would be useless is to assume that conviction is inevitable under the Double Jeopardy Clause on an assumption that appears to be inconsistent with the presumption of innocence... Somerville at 481.*

At the point in the trial at which it was decided that the alleged extra-judicial statements as to Glover could not be admitted, and it can be said that without a doubt, the Governments case was going badly as to defendant Glover. It is the contention of the defense that the severance and mistrial were granted to aid the Government in its case against the defendant Glover. It would not in fact have been the first time a case had continued without important evidence. The defense urges that the discretion of the trial court should not be used to secure a more favorable stance for the prosecution. The defense concludes, then, that the requisite " manifest necessity" was not present as to defendant Glover to mandate the declaration of a mistrial.

POINT 3

THE TESTIMONY OF MR. FRED GORMANDY, A SPECIAL AGENT OF THE DRUG ENFORCEMENT ADMINISTRATION WAS PREJUDICIAL AND BIASED THE DELIBERATIONS OF THE JURORS

Mr. Fred Gormandy, a Special Agent of the Drug Enforcement Administration, testified that he arrested Solomon Glover and Charles Curtis on or about October 30th 1972 (P. 66 of Gormandy-direct). He further testified that after Solomon Glover was taken to to the Police Precinct, finger printed and placed in a Cell. (P. 103, 104 & 105). The records of the 32nd Precinct on West 135th Street, in New York County, revealed that Solomon Glover was not arrested and that Charles Curtis was not taken into custody with another person.

Mr. Gormandy testified that he took $1,000.00 in United States Currency from the person of Solomon Glover. New York City Police Department records indicate that the currency was taken from the person of Charles Curtis, when he was arrested with Solomon Glover. The jury prior to its verdict requested that Gormandy's testimony to be read to them. a subsequent search of the New York City Police Department records indicate that Gormandy's testimony was inconsistent with the recorded facts.

It is respectfully submitted that the defendants rights to a fair trial have been substantially impaired by the fact that Special Agent Gormandy through failure or recollection or by design failed to reveal during his testi-

mony that he did not recover monies from the defendant and he did not , finger print, arrest, book for any crime on the date mentioned. Certainly one must inquire into the effect that these revelations had on the jury. Surely every reasonable influence pointing to the innocence would have had to have been considered by the jury. The Special Agents testimony effectively denied the defendant the benefit of these inferences.

CONCLUSION

The Appellant has already once been placed on trial under the outstanding indictment. At that point, jeopardy attached and the Fifth Amendment to the Constitution prohibits double jeopardy. The Court below failed to accept several viable alternative actions possible under its correct interpretation of the rule (in Bruton Supra) under which some evidence was inadmissible. Appellant contends that since most of the significant powers of moving defendants for tial were in the hands of the prosecution, that it cannot be said that there was manifest necessity for declaring a mistrial to the appellant to justify taking away a constitutionally protected, right. Finally appellant contends that the appeal is not as might be argued, premature or a dilatory tactic in view of the nature of the relief sought.

The Appellant therefore prays that the indictment still pending be dismissed and that the Court grant any other and further relief as it deems proper.

Respectfully, etc.,

WILLIAM C. CHANCE, JR.

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK,
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 28 day of June, 19 74 at No. ~~U.S. Attorney's Office~~ Foley Square deponent served the within Brief upon the ~~U.S. Attorney~~ Appellee herein, by delivering a true copy thereof to ~~him~~ personally. Deponent knew the person so served to be the person mentioned and described in said papers as the appellee therein.

Sworn to before me,
this 28 day of June 19 74

Edward Bailey
Edward Bailey

William Bailey
WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1975